30 May 2012

Joint Select Committee on the NSW Workers Compensation Scheme
Parliament House
Macquarie St
Sydney NSW 2000

To: Committee Members,

**RE: NSW Farmers further submission to the Joint Select Committee on the NSW Workers Compensation Scheme and response to questions on notice**

NSW Farmers appreciates the opportunity afforded to us to provide our views to the Committee. As previously explicated in our submission and verbal evidence, NSW Farmers supports the call to reform the current Workers Compensation Scheme as it is ineffective in encouraging injured workers to return to work, financially unsustainable, not commercially competitive compared to other states and encumbered by overly complicated red tape. NSW Farmers agrees in principle with the options for reform suggested in the released Issues Paper. In addition we strongly encourage the Committee to remove the coverage of recess claim from the Scheme unless if the cause of injury is directly related to work, and to remove "rural work" from the class of deemed workers for the purpose of the Scheme's coverage.

Farmers believe that workers compensation, being a special no-fault scheme in which the Government requires the employer to take all responsibility to fund compensation costs for a workplace injury, should be limited in terms of its coverage to injuries incurred when work is a substantial contributing factor. We are concerned with how courts have determined workplace injury where work is a substantial contributing factor. There are several cases in which injuries have been incurred in the farming workplace, but not because the undertaking of work or related to work in any way. In our verbal evidence, NSW Farmers brought up two incidents as examples. We were subsequently requested by the Committee to provide further details. The first case we mentioned was the case of *McCurray v Lamb*[1] where a shearer was shot by one of

[1] (1992) 8 NSWCCR 556.

his colleagues after sleeping with a female member of the shearing team. Enclosed is a copy of the decision.

The other high profile incident is that of Wayne and Mary Goode, shearing contractors in the Central West of NSW who were presented with an astronomical compensation bill as a result of a shearer receiving an eye injury from a fish hook sustained whilst fishing during break when the wet sheep couldn't be shorn. Below is an excerpt of the Hon. Duncan Gay's speech describing the incident[2]:

> **The Hon. DUNCAN GAY**
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> On 3 March this year the *Land* reported that Culcairn-based shearing contractors Wayne and Wendy Goode are paying back a mortgage-size workers compensation bill, largely for what they claim to be the result of a fishing accident. In 2000 the Goodes took a shearing team to Nyngan, where the shed was declared wet following rain. For those not involved in the pastoral industry, when sheep have a certain level of water in their wool they are declared wet. It is inappropriate to expect people in the industry, particularly shearers, to work with sheep in that condition. In addition, it is inappropriate to bale wool that is wet.
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> The workers are on pay—or they used to be in my day—until the situation is resolved. So, the shearers remain in the shed, as it were. Mr Goode claimed that some shearers, instead of going home, opted to stay in the shed huts—accommodation associated with the shed. Honourable members should remember that this occurred at Nyngan. The shearers then went fishing, during which time one suffered an eye injury and had to be taken to Dubbo hospital. The shearer not only kept his sight, according to Mr Goode, but also $174,000 that WorkCover awarded him in damages, apparently based on the fact that he was still camping at the worksite. In the feature article, Mr Goode expressed his frustrations that WorkCover failed to speak directly to either him or his wife regarding this claim. The result was that two years later, in addition to having to pay a genuine back injury claim, Mr Goode received a $220,000 workers' compensation bill, which he was given seven days to pay. WorkCover's request of this employer in this case was pretty tough. Mr and Mrs Goode sold some of their assets to enable them to make repayments of $2,500 per month. I am sure honourable members can appreciate Mr Goode's frustration with this unjust system.

[2] New South Wales, Parliamentary Debates, Legislative Council, 8 June 2005, (Duncan Gay, Deputy Leader of the Opposition in the Legislative Council).

During the public hearing, the Committee also invited us to comment on the seven recommendations put forward by the NSW Nurses' Association. We would like to take this opportunity to respond accordingly. The seven recommendations contained in the NSW Nurses' Association submission are annexed below:

1. We recommend that there be a financial incentive for employers to provide suitable work to injured workers. This could come in the form of a reduced premium.
2. We recommend that severe penalties be imposed on employers and individuals who refuse to provide work to injured workers where such work is available. A financial disincentive could also be imposed by way of an increased premium.
3. We recommend that insurers be given the capacity, and then be obliged to rigorously examine whether their clients are able to provide suitable work to an injured worker prior to termination or suitable work being withdrawn and prior to requiring that worker to seek work elsewhere.
4. We recommend that in any legal proceedings dealing with the question of whether suitable work is available, the onus be on the employer to establish that no suitable work exists.
5. We recommend the implementation of some form of independent review which must be undertaken prior to an employer being able to withdraw suitable work or terminate injured workers and thereby cost shift to the workers compensation scheme. This review could be conducted by the Workers Compensation Commission and should involve input from the employer, insurer and the injured worker. The aim of the review should be to assess the capacity of the employer to provide work to the injured worker. Employers should then be obliged to offer any duties which are found to exist through this review. Indeed, if the Committee is to recommend Work Capacity Testing as foreshadowed on page 25 of the Issues Paper, such an assessment could be undertaken in tandem with that process. Whilst the Association is opposed to the Work Capacity Testing of workers as proposed by the Issues Paper, we believe that there is clear justification for the work capacity testing of employers. This would require only minimal legislative amendment as the Workers Compensation Commission already has the power to recommend the provision of suitable work. We propose the strengthening of this power to ensure such recommendations are a prerequisite and are binding.
6. We recommend that it be an offence for an employer to require a prospective employee to declare whether they had previously suffered a workers compensation injury unless that injury would prevent him or her from performing the inherent requirements of the role. An offence of this kind could be inserted into anti-discrimination legislation.

7. We recommend that it be an offence for an employer to inform another prospective employer that a former employee has suffered a workers compensation injury. An offence of this kind could be inserted into anti-discrimination legislation.

In our experience, farming business employers are generally keen to bring injured employees back to work as soon as possible when the work is available. As it can be appreciated, most work related to a farm operation is physically demanding and consequently farmers have concerns that the employee may re-injure themselves in the performance of work if the work is not suitable to the employee's level of limited capability at the time. Employers are frequently not kept up to date about the employee's medical condition which made it difficult to ascertain the suitable type of light duties suitable. The proposed statutorily required work capacity testing would be of assistance to accurately ascertain what type of work will be suitable.

NSW Farmers agrees that positive incentives in the form of premium discounts to assist farmers and other small businesses to implement safety initiatives and to have in place systems which will enhance their capacity to provide suitable duties in the circumstance of a workplace injury or illness.

However with regard to the second recommendation made by the NSW Nurses' Association, NSW Farmers is aware that the Committee has received evidence from WorkCover which outlines that a small business is a party to a workers' compensation claim once every 20 years. Therefore as a result of this lack of experience, these small businesses are not well equipped to respond to managing employee's return to work at the point in time of an injury. Once an injury has occurred it is unlikely that the disincentives proposed by the NSW Nurses' Association will be able to drive a different performance with regard to the provision of injury management and suitable duties.

To this matter, NSW Farmers agrees that scheme agents (insurance providers) have a greater role to educate both employers and injured workers on the benefit of return to work and the process to be expected. From discussions with members, one of the drivers of having a protracted claim is the passive approach of scheme agents in managing a claim. However,

NSW Farmers strongly disagrees that a scheme agent should be given the power to probe into the internal working of a business operation and have the ability to make decisions on available light duties. Provisions of light duties frequently require re-organisation of some work flow with the potential of having wider implications in the running of a farm. Handing over this power to a third party who has no understanding of the farm operation will not only be inefficient, but due to the family nature of the majority of farming operations, has an increased potential of driving conflict within the workplace. This leads to a situation which may be detrimental to achieving the best possible rehabilitation outcomes for the injured worker.

For larger employers, NSW Farmers is of the view that the current Scheme, through its provision for premium experience adjustment, more than adequately incentivises employers to minimise the cost of a particular claim including provision of light duties. The longer a period of a claim's duration, the more it will drive up cost of claim which will impact on the calculation of business future premium for that year and the subsequent two years after the claim is commenced.

NSW Farmers vehemently opposes the above mentioned recommendation 4 and 5. Through our experience, NSW Farmers is of the opinion that there is no reluctance from farmers to provide light duties when they are available and the employee is capable of performing the light duties. Farmers are practical people who continuously having to juggle competing commitments in the running of their farm. Having rehabilitated workers back at work, wherever possible, would be great assistance to their farming business.

An independent review board for available light duties will just add another layer of unnecessary red tape and cost burden to the Scheme. It is also impractical to implement operationally. Suitable light duties change from time to time as employee's work capacity change, work operation also change from time to time. Injured worker's capability may also deteriorate during the performance of light duties which deem the agreed light duties to no longer be suitable. As proposed, it means all three parties (employee, employer and scheme agent) and most likely their representatives would potentially be required to go to the Workers Compensation Commission every time there is a disagreement on suitable light duties. This is a significant

imposition for business operators, especially small and medium business operators with no dedicated resources. Further, increasing the amount of adversarial dispute resolution within the workers compensation system is likely to reduce the efficiency of the scheme. This is on the basis that less of the available premium revenue obtained is spent on the injured worker. Likewise, the proposal will be socially inefficient on the basis of the red tape that it will place upon farming businesses. NSW Farmers submits that each additional hour a farm operator is required to go through the red tape is a missed opportunity as they are taken away from the actual running of their farm operation; businesses that supports the local community and provide for employment opportunities.

Our understanding on the objective of recommendation 6 and 7 is to protect injured workers future job prospect. NSW Farmers agree in principle that injured workers who have been or still are on workers compensation should have the same opportunity as any other prospective worker provided that they are the most suitable for the job. However, NSW Farmers disagrees that it necessitates amendment to the current anti discrimination legislations. The right to prospective employees to be treated equally is specifically provided for in the *Fair Work Act 2009*. Injured workers also have access to protection against discrimination on the basis of disability regulated in the relevant legislations, either *the NSW Anti-Discrimination Act 1997* or the *Disability Discrimination Act 1992 (Cth)*.

8 NSWCCR 556 (90A40858)

McCurry v. Lamb

Supreme Court of New South Wales (Court of Appeal):

Clarke JA, Handley JA, Sheller JA

9 December 1992

FOR WHAT INJURIES COMPENSATION PAYABLE - ACTS INCIDENTAL TO EMPLOYMENT - LODGING ON EMPLOYER'S PREMISES - SHEARER LIVING AT STATION - INJURY DUE TO CRIMINAL CONDUCT OF FELLOW EMPLOYEE - EMPLOYEE SLEEPING WHEN INJURED - INJURY IN COURSE OF EMPLOYMENT

The worker, a shearer, was sleeping in the bed of a female employee, in lodgings provided by the employer, when he was shot and seriously injured by a deranged fellow employee. The trial Judge found that the injury occurred in the course of his employment. On appeal.

Held (dismissing the appeal):

That the worker sustained his injuries "at a particular place", namely the camp, where the employer had induced or encouraged him to stay, and while he was doing something that was reasonably incidental to his temporary residence there, namely sleeping. No question of gross misconduct arose and the fact that the injuries were caused by the deliberate criminal conduct of a fellow employee did not affect his right to compensation. The worker received his injuries in the course of his employment.

Hatzimanolis v. ANI Corporation Ltd, (1992) 173 CLR 473; 8 NSWCCR 242 and

Inverell Shire Council v. Lewis, (1992) 8 NSWCCR 562 followed.

Cases Cited

The following cases are cited in the judgments:

Hatzimanolis v. ANI Corporation Ltd, (1992) 173 CLR 473; 23 NSWLR 125; 8 NSWCCR 242

Inverell Shire Council v. Lewis, (1992) 8 NSWCCR 562

APPEAL

This was an appeal from the judgment of Moroney CCJ, in respect of a determination of a claim for compensation where an injury was received, during an interval between work, at lodgings provided by the employer.

J. Poulos QC and J. Lichtenberger, for the appellant

B.J. Gross QC and R. Harrington, for the respondent

CUR ADV VULT

JUDGMENT: CLARKE JA

I agree that the appeal should be dismissed generally for the reasons given by Handley JA.

JUDGMENT: HANDLEY JA

This is an appeal by the employer from awards of weekly and lump sum compensation made by Moroney CCJ in favour of the respondent worker. The appeal to this Court is a full appeal on fact as well as law.

On 7 November 1989 at about 11.30 p.m. the worker, a shearer, was shot and badly injured while asleep in the jackeroos' cottage on Oolambuyan Station about 70 miles north of Deniliquin. He was employed by the appellant, a shearing contractor, as part of a team of eight shearers, a wool classer, a wool presser, a married cook and two female rouseabouts. The appellant had the shearing contract for the station and the team arrived there on Sunday 29 October. The appellant himself, the wool classer, and the two female rouseabouts were quartered in the jackeroos' cottage which was about 400 yards from the shearers' quarters. There were three bedrooms and a lounge room in the cottage. The men had separate bedrooms and the two girls shared the third bedroom which had two single beds.

The worker and the other male employees shared accommodation at the shearers' quarters where the dining room mess used by all the staff was located. Shortly after his arrival at the camp the worker formed a relationship with Karen Deakin, one of the female rouseabouts which quickly developed into a sexual relationship. On Wednesday evening of 1 November in the shearers' quarters Websdale, another shearer, then affected by drink picked up the worker's gun and at one stage pointed it at him. The worker succeeded in disarming Websdale who then began to cry. By this time the worker was aware that there was trouble between Websdale and the girls. Websdale had had "a one-night stand" with Deborah Astell, the other rouseabout and had subsequently been rejected by her.

On Thursday 2 November after the evening meal the worker went to the jackeroos' cottage. He had a beer with the employer and the wool presser in the lounge room and at about 10.30 he said to the employer that he was going into the girls' room to see Karen. He entered the room and had sexual intercourse with Karen Deakin in her bed and slept with her that night. The next morning at about 6.30 or 6.45 the employer called out to the worker from outside the girls' room and asked him to get moving. The worker got up, got dressed and got into a vehicle with the employer and the wool presser and was driven down to the shearers' quarters for breakfast. At the end of the day's work the worker was driven to his home at Deniliquin where he spent the weekend. He returned on the Sunday night and slept in the shearers' quarters. On Monday night 6 November after the evening meal he accompanied Karen Deakin to the jackeroos' cottage, had sexual intercourse with her and slept with her that night. He returned to the shearers' quarters in the morning for a shower and breakfast. That day at about 1.00 p.m. the shearers decided that the sheep were too wet and shearing ceased. It was Melbourne Cup Day and a group from the team including the worker, the two girls and Websdale were driven to Carrathool where they went to the hotel, had some drinks and watched the Melboume Cup. Later they went fishing on the banks of the Murrumbidgee and had some more drinks. The party returned to the hotel where Deborah Astell met one Ian Hutchins who she invited back to the jackeroos' cottage. The worker and Karen Deakin left the hotel about 7 or 7.30 and were driven back to the camp. On arrival they went to the girls' bedroom in the jackeroos' cottage and again had sexual intercourse. Later Deborah Astell and Ian Hutchins arrived. The worker was in Karen Deakin's bed. Some music was played and some alcohol was consumed but the worker was asleep.

About 11.30 p.m. Websdale kicked the door open. The worker and Karen Deakin were in one bed and Deborah Astell and Ian Hutchins were in or on the other. Websdale had the worker's gun. He shot and fatally wounded Karen Deakin and Ian Hutchins and shot and seriously injured the worker. As a result of the injuries he then received the worker is now a paraplegic and totally incapacitated.

The trial Judge found that the worker was permitted or authorised to reside in the camp and was encouraged to do so by the provision of free accommodation and meals. He was not confined to any particular place in the camp for sleeping purposes and in any event the employer knew that the worker slept in the jackeroos' cottage on the night of Thursday 2 November. He did not object and took no steps to prevent the worker sleeping there again. The Judge held that sleeping at the camp was incidental to the worker's employment and conducive to its further performance, and therefore he had been injured in the course of his employment.

Since the decision under appeal the High Court has given judgment in HATZIMANOLIS v. ANI CORPORATION LTD, (1992) 173 CLR 473; 8 NSWCCR 242 where it redefined the principles which determine when an employer is liable to compensate a worker for injuries received during intervals between work.

It is clear from the evidence and the facts found by the trial Judge that this worker was injured during an interval between work while he was staying in a camp provided by the employer. At the time the worker was sleeping in Karen Deakin's bed but he was not "out of bounds". He was still within the camp area where other employees had their sleeping quarters. The employer knew that he had slept there at least once before and had not raised any objection or taken any steps to prevent the worker sleeping there again.

This appeal and the appeal in INVERELL SHIRE COUNCIL v. LEWIS, (1992) 8 NSWCCR 562 were argued the same day before this Court. In my opinion, for the reasons given in INVERELL SHIRE COUNCIL v. LEWIS (also delivered today), the worker sustained his injuries "at a particular place", namely the camp, where the employer had induced or encouraged him to stay, and while he was doing something that was reasonably incidental to his temporary residence there, namely sleeping. No question of gross misconduct arises and the fact that the worker's injuries were caused by the deliberate and criminal conduct of a fellow employee does not affect his right to compensation. Accordingly the worker received his injuries in the course of his employment.

This result may seem to some anomalous or even bizarre. The worker received his catastrophic injuries as the result of the actions of a deranged fellow shearer when and because he was in bed with a fellow employee in the rouseabouts' quarters. Another young man on or in the next bed, who was not an employee, was killed. Had that young man sustained similar injuries and lived he would only have been entitled to the invalid pension. The risk of injury that materialised to the worker occurred after working hours and because of what he and others did in their own time. The only involvement of the employer was that the female rouseabouts and Websdale were also employees, the employer knew of the worker's sexual relationship with one of the rouseabouts and the shooting occurred in the camp.

The employer, unlike the worker, did not know how distraught Websdale had become, following his rejection by the other rouseabout, and did not know that he had threatened

to use the worker's own gun on the girl. The risks of injury from a deranged lover with access to a gun might be thought to be a community rather than an employment risk, even if fellow workers are involved.

This Court is nevertheless compelled to reach its result because of the interpretation that the High Court in HATZIMANOLIS v. ANI and earlier cases has placed on the language of the Workers Compensation Act which entitle the worker to compensation for injuries arising "in the course of his employment". This interpretation has expanded the meaning of these simple words far beyond what might be thought to be their ordinary and natural meaning. However this Court is bound to apply the existing law and any change in that law is a matter for the Parliament.

The award was also challenged on the ground that the Judge had wrongly refused the employer an adjournment and in doing so had denied him natural justice.

The Judge had taken the worker's evidence at Albury on 24 October 1990 and the case had then been adjourned to Sydney for further hearing on a December. Following the first hearing the employer's legal representatives decided that it would be desirable to call Deborah Astell, Mr John Turner a fellow shearer, and Mr Thompson the wool classer to give evidence in Sydney at the adjourned hearing. When the case was called on none of these witnesses were available and the employer applied for an adjournment to secure their attendance. There was hearsay evidence before the Judge that Mr Turner had been served with a subpoena but had refused to attend. There was no evidence, even of a hearsay nature, that Deborah Astell or Mr Thompson had been served. The employer did not have an affidavit of service of the subpoena on Mr Turner. The Judge said that the employer had had ample time to secure the attendance of the witnesses and refused an adjournment.

The evidence of the worker had not been challenged in cross-examination except on matters of detail. The employer himself did not give evidence but wished to call, or perhaps to consider calling, one or more of these witnesses to contradict the evidence of the worker on these matters of detail. These details were of doubtful relevance even before the decision of the High Court in HATZIMANOLIS and are of no relevance since. I have not been persuaded that the Judge erred in the exercise of his discretion and I am quite satisfied that there has been no miscarriage of justice. In my opinion the appeal should be dismissed with costs.

JUDGMENT: SHELLER JA

I have had the benefit of reading the judgment of Handley JA. His Honour has set out the facts and accordingly I need not repeat them. I agree with his Honour that Moroney CCJ did not err in the exercise of his discretion in refusing the employer an adjournment.

To the extent that the findings of fact made by the trial Judge were challenged on the appeal, they were, in my opinion, open on the evidence and should not be disturbed. The question was whether, on those findings, the worker's injury occurred during the course of employment. The worker was injured in sleeping accommodation at the work-site where he had been encouraged to stay. On the trial Judge's findings of fact and for the reasons that I gave in INVERELL SHIRE COUNCIL v. LEWIS, I am of opinion that the trial Judge was entitled to conclude that the injury occurred during the course of the worker's employment.

Accordingly, I agree that the appeal should be dismissed with costs.

Appeal Dismissed

Solicitors for the appellant: Abbott Tout Russell Kennedy

Solicitors for the respondent: Carroll & O'Dea